TING YUK KIONG

v.

MAWAR BIRU SDN. BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ARIFIN BIN HJ. JAKA J
[COMPANIES WINDING - UP NO. 28-76 OF 1993]
18 FEBRUARY 1995

***COMPANY LAW**: Application to stay winding-up of company - Section 243(1) Companies Act 1965 - Principles applicable - Discretion of the Court - Whether members of the company consenting to the stay - Whether company solvent - Report of Provisional Liquidator on financial status of the company considered - Section 243(2) Companies Act 1965 - Whether Provisional Liquidator made proper investigation - Whether applicant has made out sufficient case for a stay.*

A petition for the winding-up of the respondent company was filed by the petitioner on 21 July 1993 on the ground that the company was indebted to the petitioner in the sum of RM36,057.21. The statutory notice of demand pursuant to s. 218(2)(a) of the Companies Act 1965 (the Act) was served on 3 June 1993 but the company failed to pay the debt within the specified period of 21 days. Thereafter, the petitioner filed the petition for winding-up of the company and served the petition on 16 August 1993 on the relevant parties. The said petition was heard on 22 February 1994 where the Court ordered that the company be wound up and the Official Receiver be appointed as Provisional Liquidator of the company. On 21 June 1994, the applicant filed a notice of motion pursuant to s. 243(1) of the Act for an order *inter alia* that all further proceedings in the winding-up of the company be stayed absolutely.

In exercising its discretion the Court considered the principles applicable to the granting of a stay of the winding-up and directed the Provisional Liquidator to submit a report in respect of the current financial status of the company. In his report, the Provisional Liquidator stated that the company was solvent and recommended that the winding-up of the company be stayed. The applicant, who was a director and contributor of the company, stated in his affidavit that there were merits to the company's claim and that the company had paid the Provisional Liquidator the sum of RM72,116.49 consisting of the sum owed to the petitioner and another creditor.

The question was whether the applicant had succeeded in making out a sufficient case for a stay of the winding-up.

Held:

[1] All the directors of the company had given their consent for the applicant to proceed with the application but the consent of each member to the stay is essential. The applicant has failed to convince this Court that each member of the company has consented or would otherwise be bound not to object. It is not sufficient that the creditors had been paid in full and that the Provisional Liquidator's fees and expenses have been provided for. This does not in any way reflect the solvency of the company. The payment was made by the applicant who came to the rescue of the company.

[2] The applicant's affidavit does not disclose sufficient information about the current trading activities and general solvency of the company to assist the Court in making a decision. Furthermore, the Court is not convinced that the company is solvent as the Provisional Liquidator appears to have based his opinion on the mere fact that the company had paid

its two creditors, the fees and expenses of the Provisional Liquidator had been provided for and that the company had RM120,000 cash in hand. No proper account was produced to indicate who was keeping the money and it is hard to believe that the company had that amount and yet did not settle its liabilities until after the winding-up order was made.

[3] The report does not reflect that the Provisional Liquidator has carried out a proper investigation into the affairs of the company as he has not stated therein that he has made reference to the company's books or audited accounts or consulted with the principle officers of the company such as the auditor or secretary. This he has to do before coming to a conclusion that the company is solvent.

[4] In the circumstances the Court finds the company insolvent and that the applicant has not made out a case for a stay of the winding-up proceedings of the company.

[Application dismissed with costs].

Cases referred to:
In Re Calgary and Edmonton Land Co. Ltd. [1975] 1 All ER 1046 ***(foll)***
In Re Warbler Pty Ltd [1982] 6 ACLR 526 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 218(2)(a), 243(1) & (2)
Companies Act 1948 s. 256(1) (UK)

For the applicant - Rozita Yeo; M/s. Yeo & Co.
For the respondent - S.C. Yap; M/s. Arthur Lee & Company
For the official receiver - M. Jegatheesan

JUDGMENT

Hj. Arifin bin Hj. Jaka J:

This application by way of notice of motion (encl. 17) is made by Mawar Biru Sdn. Bhd. (the company) for an order that:

(a) All further proceedings in the winding up of the company be stayed absolutely.

Alternatively

(b) All proceedings in relation to the winding up of the company be stayed on such terms and conditions as this Honourable Court thinks fit.

The company was incorporated on 9 November 1984 as a limited company under the Companies Act 1965 with its registered office at S2-36 & S2-37 Wisma Abad, Century Garden, Johor Bahru. The paid up capital of the company is RM325,004 as against the authorised capital of RM2,000,000 divided into 2,000,000 shares of RM1 each.

The main objects for which the company was established are as follows:

(a) To carry on the business of an investment company and for that purpose to acquire and hold either in the name of the company or in that of any nominee shares, stock, debentures, notes, bonds or securities by original subscription, purchase, exchange and to subscribe for the same subject to such terms and conditions (if any) as may be thought fit. Provided always that no surplus arising upon any such sale shall be available for distribution through the profit and loss account.

(b) To buy, take on lease, or otherwise acquire any real and personal property, lands, buildings, houses, apartments, condominium, flats, rights and assessments of every kind which the company may think necessary or convenient for the purposes of its business and to issue and allot fully or partly paid shares in the capital of the company in payment or part payment of any real or personal property purchased or otherwise acquired by the company or any services rendered to the company.

Provided always that no surplus arising upon any such sale shall be available for distribution through the profit and loss account and other objects set forth in the memorandum of association thereof.

On 21 July 1993 a petition for winding up the company was filed by Ting Yuk Kiong (the petitioner) who was a creditor of the company. In para. 5 of the petition it is alleged that the company is indebted to the petitioner in the sum of RM36,057.21 being the taxed costs awarded to the petitioner in respect of Originating Summons No. 24-677 of 1989 in the High Court of Malaya at Johor Bahru and Appeal No. 03-73 of 1990 in the Supreme Court in Kuala Lumpur.

The statutory notice of demand pursuant to s. 218(2)(a) of the Companies Act 1965 was served on 3 June 1993 by leaving it at the registered office of the company. The said notice of demand required the company to pay to the petitioners solicitors the said sum of RM36,057.21 within twenty one (21) days from the service of the notice on the company failing which it would be deemed to be unable to pay its debts and appropriate action would be taken for winding it up. The company has neglected and failed to pay the debt after a lapse of the specified period of 21 days. The petitioner filed the petition for winding up the company on the ground that it is unable to pay its debts. The petition was duly served on the company on 16 August 1993, on the Official Receiver on 10 August and on the Registrar of Companies on 12 August 1993.

The petition was heard on 22 February 1994 when it was ordered by the Court:

(i) that the company be wound up by the Court under the provisions of the Companies Act 1965;

(ii) that the Official Receiver Malaysia be appointed as Provisional Liquidator of the company; and

(iii) that the petitioner be allowed the costs of and incidental to the winding up which is to be taxed by the proper officer of the Court and paid by the Liquidator out of the assets of the company.

At the hearing of the petition the company was not represented by any Counsel although the petition was duly served on it.

Some four months later i.e., on 21 June 1994 the present application for stay of all further proceedings in relation to the winding up of the company was filed by Harry Lee Yew Tong (the applicant) who is one of the directors and a contributory of the company. The application for stay was made under s. 243(1) of the Companies Act 1965 which reads as follows:

> At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

This section is substantially similar to s. 256(1) of the English Companies Act 1948. In *Re Calgary and Edmonton Land Co. Ltd.* [1975] 1 All ER 1046 Meggary J had occassion to refer to s. 256(1) and emphasised at p. 1050:

> Under s. 256 itself the Court "may ... on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed" make an order for the stay 'on such terms and conditions as the Court thinks fit'. Quite apart from any authority... this language seems to me to make it abundantly clear that the jurisdiction is discretionary, and that it has on those who seek a stay to make out a sufficient case for it.

Under the law therefore the granting of a stay of further proceedings of the winding up is a discretionary matter for the Court and the onus is on the applicant to make out a positive case for a stay. In exercising its discretion the Court has to consider certain factors and would act on certain principles which have been established by decided cases. In *Re Warbler Pty Ltd* [1982] 6 ACLR 526 the following principles are enumerated:

(a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co. Ltd* [1975].

(b) There must be service of notice of the application for a stay on all creditors and contributories and proof of this (*Re South Barrule State Quarry Co.* [1969] LR 8 Eq. 688, *Re Bank of Queensland Ltd.* [1870] 2 QS CR 113 referred to).

(c) The nature and extent of the creditors must be shown and whether or not all debts have been discharged. (*Krextile Holdings Pty Ltd. v. Widdows* [1974] VR 689 at 694; *Re Dalta Homes Pty Ltd.* [1972] 2 NSWLR 22 at 26 referred to).

(d) The attitude of creditors, contributories and the liquidator is a relevant consideration. (*Re Calgary and Edmonton Land Co. Ltd.* referred to).

(e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought. (*Re a Private company* [1935] NZLR 120: *Re Mascot Home Furnishers Pty Ltd.* [1970] VR 593 at 598 referred to).

(f) If there has been non-compliance by directors with their statutory duties as to the giving of information or furnishing a statement of affairs a full explanation of the reasons and circumstances should be given. (*Re Telescriptor Syndicate Ltd.* [1963] 2 Ch. 174 referred to).

(g) The general background and circumstances which led to the winding up order should be explained. (*Krextile Holdings Pty Ltd. v. Widdow supra* referred to).

(h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to the "commercial morality" or the "public interest". (*Krextile Holdings Pty Ltd. v. Widdows supra, Re Dalta Homes Pty supra* referred to).

In re Calgary and Edmonton Land Co. Ltd. the Court had to decide on an application for stay of the windingup proceedings of the company. The application was dismissed and it was held *inter alia*:

> (1) the Court would in normal circumstances generally exercise its discretion to grant a stay only where the applicant showed (a) that each creditor had either been paid in full or that satisfactory provision for him to be paid in full was to be made, or that he consented to the stay or was otherwise bound not to object to it; (b) that the liquidator's position

a was fully safeguarded, either by paying him the proper amount of his expenses or sufficiently securing payment and (c) that each member either consented to the stay, or was otherwise bound not to object to it or there was secured to him the right to reserve all that he would have received if the winding up had proceeded to its conclusion.

I now consider whether the applicant has succeeded in making out a sufficient case for a stay of the winding up. The application is supported by an affidavit affirmed by the applicant b himself. The applicant says that he is one of the directors and a contributory of the company. He explains the absence of any representation by the company at the hearing of the petition for winding up on 22 February 1994 was "due to miscommunication between the staff at Mawar Biru Sdn. Bhd.'s registered office and the diretor of Mawar Biru Sdn. Bhd." (para. 4). In para. 5 of the affidavit it is stated that the company had paid to the Official Receiver who is the Provisional Liquidator the sum of RM72,116.49 being the sum due to the petitioner c amounting to RM36,057.21 and to another creditor one Lim Kai Chew, amounting to RM36,059.28.

Paragraph 7 of the affidavit discloses that the company has two civil suits namely Civil Suit No. 23-241 of 1989 and Civil Suit 23-242 of 1989 against Lim Kai Chew and the petitioner respectively which are still pending. The applicant was advised and verily believe that there are merits in the company's claim in these suits. In any event the prosecution of these cases d would be conducted by the Provisional Liquidator. The affidavit to my mind does not disclose sufficient information about the current trading activities and position and general solvency of the company that could assist the Court in deciding whether to grant the stay of the winding up proceedings. In my anxiety to find out more about the current trading activities of the company and its financial status I resorted to s. 243(2) of the Company's Act 1965 e which is as follows:

On any such application the Court may, before making an order require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.

I adjourned the hearing and directed the Provisional Liquidator to compile and file a report in respect of the current financial status and activities of the company. The report dated f 27 September 1990 was filed and the relevant portion of which are reproduced below:

4. Pernyataan hal ehwal bagi syarikat telah dikemukakan oleh seorang pengarah syarikat En. Lee Yew Tong kepada Pegawai Penerima pada 21hb. April 1994. Asset-asset dan liabiliti-liabiliti yang dicatitkan dalam pernyataan tersebut adalah seperti berikut:

4.1 **Asset**
Wang Tunai dalam tangan - RM 120,000

g 4.2 **Liabiliti**
Pemuitang tak bercagar - RM72,114.42.

5. Pada 19hb. April 1994 En. Lee Yew Thong (contributory) telah membayar RM72,116.49 kepada Pegawai Penerima untuk menjelaskan hutang-hutang syarikat dan RM1,300 pada 27hb Jun 1994 untuk menampong kos pentadbiran.

h 6. Sebelum prosiding penggulungan ini terdapat dua tindakan guaman difailkan di Mahkamah Yang Mulia ini oleh syarikat ini. Kes-kes tersebut masih belum diputuskan oleh Mahkamah dan didaftarkan sebagai Guaman No:23-241 Tahun 1989 terhadap Lim Kai Chew (pemiutang) dan Guaman No:23-242 Tahun 1989 terhadap Ting Yuk Kiong (f) (pempetisyen).

7. Kesemua pengarah-pengarah syarikat tersebut telah menghadiri diri di Pejabat Pegawai Penerima di Johor Bahru pada 22hb. Ogos, 1994 dan mereka bersetuju supaya En. Lee Yew i Tong meneruskan premohanan untuk penggantungan prosiding penggulungan.

8. Setakat ini Pegawai Penerima masih belum menerima apa-apa bukti hutang daripada mana-mana pihak.

9. Pegawai Penerima mempunyai wang yang mencukupi untuk membayar segala hutang sepertimana yang dicatitkan dalam penyataan hal ehwal syarikat tersebut.

10. Pada pendapat Pegawai Penerima dan Pelikuidasi, syarikat ini adalah solven.

11. Memandangkan syarikat ini mampu membayar hutangnya, Pegawai Penerima dan Pelikuidasi berpendapat bahawa syarikat ini patut dibenarkan untuk hidup semula dan dapat meneruskan kes-kes guaman yang telah mereka mulakan di Mahkamah.

It is evident therefore from the report that the applicant as a director and contributory of the company had made payment to the Provisional Liquidator to settle the company's liability to the petitioner and to another unsecured creditor. The Provisional Liquidator's fees and expenses had also been paid. All the directors of the company had given their consent on 22 August 1994 for the applicant to proceed with the application. But no mention is made whether members of the company had consented to the stay or would otherwise be bound not to object to it. The affidavit in support of the application is also silent on this issue. The consent of each member to the stay is essential: (*Re Calgary's* case). The applicant has failed to convince this Court that each member of the company has consented or would otherwise be bound not to object. It is not sufficient that the creditors had been paid in full and that the Provisional Liquidator's fees and expenses have been provided for. This does not in any way reflect the solvency of the company. The payment was made by the applicant who came to the rescue of the company.

The Provisional Liquidator further says in his report that the company is solvent and recommends that the winding up of company be stayed. I am not convinced that the company is solvent as the Provisional Liquidator appears to me to have expressed his opinion that the company is solvent based on the mere fact that the company had paid its two creditors and that the fees and expenses of the Provisional Liquidator has been provided for and the fact that the company had RM120,000 cash at hand. The report categorically states that the company's only assets as on 13 April 1994 is cash at hand in the sum of RM120,000. No proper account is produced to indicate who is keeping the money. I cannot imagine why such a large sum of money is not kept in the bank and it is indeed hard to believe that the company has that amount of cash in hand and yet did not settle its liabilities to the petitioner until after the winding up order of the company was ordered by the Court. This state of affairs does not augur well for the company and this prompted me to believe that the company is struggling to settle its debts and it is insolvent as at the time when the winding up order was made the company had no assets.

It appears to me that the report does not reflect that the Provisional Liquidator has carried out a proper investigation into the affairs of the company as he has not stated therein that he has made references to the company's books or audited accounts or made consultations with the principle officers of the company such as the auditor and the secretary. This to my mind he has to do before coming to a conclusion that the company is solvent.

Under the circumstances of the case it is my finding that the company is insolvent and based on the fundamental principle that an insolvent company should be wound up: *Re Mascot Home Furnishers Pty Ltd.* [1970] VR 593, it is my considered opinion that the winding up petition of the company should not be stayed. For the reasons stated above I rule that the applicant has not made out a case for a stay of the winding up proceedings of the company.

The application is therefore dismissed with costs.